

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
LEONIS FRANKLIN,

Plaintiff,

-against-

FUJITEC SERGE OF NY and "JOHN DOE",
A FICTITIOUS NAME FOR A FOREMAN
EMPLOYED BY FUJITEC SERGE OF NY,

Defendants.
-----X

Docket No. 07 CV 8590
(RS/DF)

ECF case

ANSWER

Defendant demands
a Trial by Jury

Defendant, FUJITEC AMERICA, INC., incorrectly sued herein as above ("FAI"), by its attorney, Gerald Neal Swartz, Esq., as and for its answer to the plaintiff's Amended Complaint, upon information and belief, respectfully alleges as follows:

AS TO THE FIRST CAUSE OF ACTION

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1, 5, and 6 of the amended complaint.

2. Denies the allegations contained in paragraph 2 of the amended complaint in the form alleged, except admits that defendant Fujitec America, Inc., incorrectly sued herein as Fujitec Serge of NY, was a foreign corporation, and refers all questions of law to this Honorable Court.

3. Denies the allegations contained in paragraph 3 of the amended complaint in the form alleged, except admits that defendant FAI was doing business in the State of New York.

4. Denies each and every allegation contained in paragraphs 7, 8, 9 and 10 of the amended complaint.

AS TO THE SECOND CAUSE OF ACTION

5. In answer to paragraph 11, answering defendant repeats and realleges each and every response heretofore made with respect to paragraphs 1 through 10 of the amended complaint as though fully set forth herein.

6. Denies the allegations contained in paragraph 12 and 13 of the amended complaint.

AS FOR A FIRST AFFIRMATIVE DEFENSE
ANSWERING DEFENDANT ALLEGES:

7. That the injuries of the plaintiff were caused in whole or in part by the culpable conduct of the plaintiff, which either bars the claims completely or else diminishes the damages by the proportion that such culpable conduct of the plaintiff bears to the total culpable conduct causing the injuries of the plaintiff.

AS FOR A SECOND AFFIRMATIVE DEFENSE
ANSWERING DEFENDANT ALLEGES:

8. That any recovery herein by the plaintiff for economic loss, either past or future, is subject to reduction pursuant to CPLR §4545(c), to the extent that such losses are subject to replacement or indemnity from collateral sources.

AS FOR A THIRD AFFIRMATIVE DEFENSE,
ANSWERING DEFENDANT ALLEGES:

9. That any judgment to be entered herein in favor of the plaintiff is subject to adjustment pursuant to Article 50-B of the CPLR to whatever extent such article might be applicable.

AS FOR A FOURTH AFFIRMATIVE DEFENSE,
ANSWERING DEFENDANT ALLEGES:

10. That, upon information and belief, plaintiff failed to mitigate his damages.

AS FOR A FIFTH AFFIRMATIVE DEFENSE,
ANSWERING DEFENDANT ALLEGES:

11. The claims of the plaintiff alleged in the amended complaint are time-barred under the applicable one-year statute of limitations, as the alleged claim accrued on July 11, 2006, and the action was not timely commenced as against the defendants.

AS FOR A SIXTH AFFIRMATIVE DEFENSE,
ANSWERING DEFENDANT ALLEGES:

12. On the date of the occurrence alleged in the amended complaint, none of defendant's employees was authorized by defendant to become involved in the acts complained of by the plaintiff.

AS FOR A SEVENTH AFFIRMATIVE DEFENSE,
ANSWERING DEFENDANT ALLEGES:

13. The injuries, if any, resulting from the acts alleged in the amended complaint of the plaintiff occurred while defendant's employee was acting outside the scope of employment of defendant, and in a purely individual capacity.

AS FOR AN EIGHTH AFFIRMATIVE DEFENSE,
ANSWERING DEFENDANT ALLEGES:

14. At the time and place set forth in the amended complaint the plaintiff willfully and maliciously and without any just cause or provocation and by the use of force, assaulted the co-defendant and would have beaten, bruised and ill-treated him had the co-defendant not defended himself against the acts of the plaintiff, who was the aggressor. In defending himself co-defendant necessarily and unavoidably placed his hands upon the plaintiff and pushed the plaintiff away from him but did no damage or injury to plaintiff and used no more force than was reasonably necessary to prevent plaintiff from injuring co-defendant. These actions constituted the assault and battery alleged by the plaintiff in the amended complaint.

AS FOR A NINTH AFFIRMATIVE DEFENSE,
ANSWERING DEFENDANT ALLEGES:

15. At the time and place set forth in the amended complaint, any conduct of the co-defendant as respecting the plaintiff was the direct result and consequence of intentional and willful provocation of co-defendant by the plaintiff.

AS FOR A TENTH AFFIRMATIVE DEFENSE,
ANSWERING DEFENDANT ALLEGES:

16. At the time and place set forth in the amended complaint, any conduct of the co-defendant as respecting the plaintiff was completely justified and warranted as a direct result and consequence of the conduct of the plaintiff toward one or more of the defendants.

AS FOR AN ELEVENTH AFFIRMATIVE DEFENSE,
ANSWERING DEFENDANT ALLEGES:

17. At the time and place set forth in the amended complaint, with the consent of the plaintiff, co-defendant and plaintiff engaged in a mutual exchange of aggressive, physical force upon one another.

TRIAL BY JURY

18. Answering defendant demands a trial by jury.

WHEREFORE, answering defendant demands judgment dismissing the plaintiff's amended complaint, together with the costs and disbursements of this action, including reasonable attorneys' fees.

Dated: New York, N. Y.
October 31, 2007

To:

Steven Siegel, Esq.
STEVEN SIEGEL, P. C.
Attorneys for plaintiff
123-12 82ND Avenue
Kew Gardens, N. Y. 11415

/S/
GERALD NEAL SWARTZ (GNS-1389)
SWARTZ LAW OFFICES
Attys for deft. Fujitec America, Inc., incor-
rectly sued herein as above
475 Park Avenue South, 8TH floor
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Tel. 718-520-0413

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SOUTHERN DISTRICT OF NEW YORK

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AFFIDAVIT
OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MANUEL AYRES, being duly sworn, deposes and says: I am not a party to this action, am over 18 years of age, and reside in Springfield, N. J.

That on November 1, 2007 deponent served the within
ANSWER

upon:

Steven Siegel, Esq.
STEVEN SIEGEL, P. C.
Attorneys for plaintiff
123-12 82ND Avenue
Kew Gardens, N. Y. 11415

Tel. 718-520-0413

by depositing a true copy of same enclosed in a postage paid envelope addressed to said counsel at said address, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

S
MANUEL AYRES

Sworn to before me, this
1ST day of November, 2007

S
Gerald Neal Swartz
Notary Public, State of New York
No. 02 SW 4685686
Qualified in Westchester County
Commission Expires April 30, 2010

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ANSWER

SWARTZ LAW OFFICES

Attys for deft Fujitec America, Inc.

sued herein as above

Office and Post Office Address:

475 Park Avenue South, 8TH Floor

New York, N. Y. 10016

Tel. (212) 725-7070